No. 78-776

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,

Petitioner,

vs.

MILTON DEAN BATCHELDER,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHARLES A. BELLOWS
JASON E. BELLOWS
CAROLE K. BELLOWS
One IBM Plaza, Suite 1414
Chicago, IL 60611
312/467-1750
Attorneys for Respondent

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60616 (312) 525-6581

In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-776

UNITED STATES OF AMERICA,

Petitioner,

vs.

MILTON DEAN BATCHELDER,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Government's Petition for Writ of Certiorari is completely without merit as appears from a reading of the well reasoned opinion of the United States Court of Appeals for the Seventh Circuit. Each of the Government's contentions is answered in such fashion that we deem a formal brief on the question unnecessary. We would only like to point out certain pertinent passages from the opinion of the Court of Appeals.

For example, the question of the various cases of other courts of appeals which are seemingly in conflict with the

opinion here we need quote only the following which appears at page 13a of the Appendix to the Petition for Certiorari:

> Our reading of the cases cited by defendant, as well as those have established the "settled rule" allowing prosecutorial choice, however, is that as applied to the choice between two statutes that have identical substantive elements they are either unpersuasive or inapplicable. Some of the opinions (e.g. *United States* v. *Mauney*, supra; *Hutcherson* v. *United States*, 345 F.2d 964, 968 (D.C. Cir. 1965) (Burger, J., concurring), certiorari denied, 382 U.S. 894) offer only an assertion that the issue was decided by the majority in *Berra* v. *United States*, supra. While *Berra* refused to disturb the conviction in a case apparently involving two identical statutes with different penalties, the defendant on appeal in *Berra* contended only that the jury should have been given a lesser-included offense instruction. Significantly, the Supreme Court majority expressly noted the question of the "validity of petitioner's conviction and sentence because of the assumed overlapping" but emphasized that "no such questions are presented here." 351 U.S. at 135. It was only Justice Black's dissent that reached the issue, and he argued that the Court should have decided the propriety of the sentence rather than, as the Court apparently had done, require that the defendant raise the issue in a Section 2255 proceeding. 351 U.S. at 137 n. 4.
>
> While the issue involved in this case thus was arguably present but not reached in *Berra* (except by the two Justices who would have vacated the sentence), in the other cases relied upon by the Government (e.g., *United States* v. *Fournier*, supra), this issue was not present. Those cases either are or rely without explanation upon cases in which the two overlapping statutes at issue did not have the same elements of proof.

As to the question of the discretion granted to prosecutors to choose between various penal statutes, we believe the Court of Appeals most adequately answered the Government's position thusly: (Appendix to Petition for Certiorari, pages 10a-12a.)

> There is strong evidence that partially in order to avoid such vague penalties, excessive executive discretion and unequal justice, it is Congress' constitutional responsibility in defining a criminal offense to affix a scheme of punishment. See *United States* v. *Hudson*, 11 U.S. 32, 34; *Berra* v. *United States*, 351 U.S. 131, 139-140 (Black, J., dissenting); cf. *United States* v. *Evans*, 333 U.S. 483. Although, apart from Justice Black's opinion in *Berra* we have found no Supreme Court opinions explicitly dealing with this precise question, the Court has emphasized that the legislature cannot shift its task of fixing punishment either to the courts (*United States* v. *Evans*, 333 U.S. 483, 486; cf. *Giaccio* v. *Pennsylvania*, 382 U.S. 399) or apparently to administrative agencies, particularly in the absence of guidance or a clear delegation. See *United States* v. *Grimaud*, 220 U.S. 506, 516; see generally W. LaFave & A. Scott, *Criminal Law* 103 (1972); L. Jaffe, *Judicial Control of Administrative Action* 110 (1965). It is our conclusion that at best Congress would have no more power to delegate the selection of punishment to the Attorney General than it does to the courts or to administrative agencies. Because this statutory scheme, if interpreted to give meaning both to Section 922 and 1202, would affix two separate and inconsistent punishments rather than one scheme of punishment (compare *United States* v. *Evans*, 333 U.S. 483), we have serious doubts about the constitutionality of that construction. See *Berra* v. *United States*, 351 U.S. 131, 139-140 (Black, J. dissenting).

Lastly, we wish to call the court's attention to the analysis of the Court of Appeals of the inconsistency of the two provisions of the same Act under consideration. The Court of Appeals enunciated three principles, (1) the principle Lenity; (2) the principle that a later enacted statute can under certain circumstances serve as an implied repeal of

an earlier statute; and (3) that when a serious doubt of constitutionality is raised a court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

The Court of Appeals adopted the third principle and, while it was confirmed about the constitutionality of the enactment involved it adopted a construction which avoided the constitutional issue.

We suggest that if there is any reason for granting certiorari in this case it would be to determine whether the Court of Appeals was correct in avoiding the constitutional issue.

For the above and foregoing reasons we respectfully submit that the Petition for Certiorari ought to be denied.

CHARLES A. BELLOWS
JASON E. BELLOWS
CAROLE K. BELLOWS

Attorneys for Respondent